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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

BRYANT KEITH WILLIAMS,

Defendant and Appellant.

B196894

(Los Angeles County
Super. Ct. No. BA293055)

APPEAL from a judgment of the Superior Court of Los Angeles County. Sam Ohta, Judge. Affirmed.

Ralph H. Goldsen, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lance E. Winters and Laura J. Hartquist, Deputy Attorneys General, for Plaintiff and Respondent.

Bryant Keith Williams appeals from the judgment entered after a jury convicted him of false imprisonment and forcible sexual penetration with a foreign object. He primarily contends that reversal is required because the trial court misspoke and accidentally told the jury he had pleaded guilty, and because evidence of his prior conviction for rape should not have been admitted. We reject those and his other contentions and affirm the judgment.

FACTS AND PROCEDURAL HISTORY

In or about early September 2005, 20-year-old Christyn T. struck up a friendship with 38-year-old Bryant Keith Williams, an auto club tow truck driver who came to help when her car battery died. Over the next few weeks, Christyn would sometimes ride with Williams while he worked. She had no romantic interest in Williams, and, during this period, rejected his request to French kiss, but did give him a kiss that she described as a little peck. On September 14, 2005, Williams took Christyn to buy a new car battery. She also planned to have Williams spend the night with her at her house, but said it was just to hang out, not to have sex. On the way to buy the car battery, Williams went to find the car of a woman he said owed him money. He found the car, took a garage door opener from inside of it, and said he would set the car on fire.

This scared Christyn, but she still agreed to spend the night with Williams at her house, although she was now scared of Williams and planned to just talk and then break things off. Later that night, she drove her father's SUV to Williams's house. She was wearing only a sweatshirt and pajama bottoms, but no underwear. When Williams got into her car, she told him she was tired. Williams asked if they were going to have sex. When Christyn said no, Williams asked if she was playing with him and whether she was "going to give him some pussy." Williams told her to move closer and kiss him. Afraid to resist because they were in close quarters, Christyn complied when Williams made her kiss him. Williams also fondled Christyn's breasts at that time.

Williams then had Christyn go with him as he ran an errand. They then returned to Williams's house. While still in the SUV, Williams again pressed his demands that

Christyn kiss him. When she complied out of fear, Williams laughed, reached a hand inside Christyn's pajama pants, and inserted a finger inside her vagina. She removed his hand and he asked her, "For real, you are telling me no?" Christyn said she was not saying no, but did not want sex just then. She told him that because she was scared and wanted Williams to believe she would have sex with him. Williams showed her a scar on his knuckles that he said came from "the last bitch who fucked with him." He put his hand down Christyn's pants again and re-inserted his fingers inside her vagina. When she pulled his hand away, Williams warned her she was "playing with a grown man," but would not hurt her as much as he wanted to because he liked her mother. He also told Christyn she would "learn about messing with an O.G. like him," and that he had just finished serving 15 years in prison. She took this to mean Williams was an Original Gangster who would kill her.

Williams took Christyn's cell phone and called another tow truck driver, telling him to tow Christyn's car from her house. When the friend refused, Williams said he would use a blowtorch to burn her car and her father's car. He also threatened to beat her until she was deaf in one ear. After tricking Williams into thinking she would have sex with him in the back seat of the SUV, Christyn ran and hid under a nearby car. From there, she phoned a friend who lived in the area and told the friend to call Christyn's mother and tell the mother to unlock the mother's front door so Christyn could run home and enter the house without delay. She then ran home. Williams called her there soon after, asking why she left and if she intended to call the police. Several hours later, Christyn reported the incident to the police. Williams was arrested, but 10 days later phoned Christyn from jail. She recorded their phone call, which included Williams apologizing for having "rubbed her the wrong way," and for "[e]verything that happened between us that wasn't positive"

Williams was charged with one count of false imprisonment by violence (Pen. Code, § 236) and two counts of sexual penetration with a foreign object (Pen. Code, § 289, subd. (a)(1)). Williams did not testify and his defense centered around attempts to show through cross examination that Christyn said or did things that led Williams to

reasonably believe she had consented to his actions. A jury found him guilty of false imprisonment and one count of sexual penetration, but found him not guilty of the other penetration count. When a prior Three Strikes conviction was added in, the court imposed a state prison term of 50 years to life.

Williams challenges the judgment on the following grounds: (1) the trial court's inadvertent statement to the jury that Williams had pleaded guilty deprived him of a fair trial; (2) the court erred by allowing evidence of his prior rape conviction; (3) the jury was improperly instructed that the age differential between him and Christyn was a factor to consider when determining whether Christyn acted out of duress; (4) the court erred by failing to instruct the jury to view evidence of his admissions with caution; and (5) he received ineffective assistance of counsel because his trial lawyer did not object to prosecutorial misconduct during closing argument.

DISCUSSION

1. *The Court's Isolated Misstatement to the Jury that Williams Had Pleaded Guilty Was Harmless Error*

Right before voir dire of the jury began, the court correctly told the panel that Williams had pleaded not guilty and that the prosecution had to prove his guilt beyond a reasonable doubt. Five days later, after jury selection was completed and the trial was ready to start, the court gave that same instruction again, but misspoke and inadvertently told the jury Williams had pleaded guilty. Defense counsel apparently did not catch the mistake and no objection was made at that time.¹ At the close of evidence, after the jury had been instructed and sent out to begin deliberations, the jury sent out a note saying

¹ When the mistake finally came to light, the court said that both the court reporter and the prosecutor recalled hearing its slip of the tongue. Williams has never contended, either below or on appeal, that prosecutorial misconduct occurred because the prosecutor heard, and did not try to correct, the court's misstatement. We attribute the prosecutor's silence to either confusion or hesitancy to interrupt the court's pretrial instructions, not to any improper motive. We do believe that a prosecutor who hears such a misstatement by the court should bring the matter to the court's attention at the earliest possible moment.

that, as a group, it believed the court had earlier said Williams pleaded guilty. The court reviewed the transcripts, agreed that it had mistakenly done so, denied a defense mistrial motion, and called the jury in for questioning.

The court admitted its mistake and told the jury Williams had not pleaded guilty. The court assured the jury that it did not know something about the case that the jury did not and that its mistake did not mean there was some outside information suggesting Williams was guilty. The court then asked the jury whether its error might have led any jurors to pay less attention during the trial because they thought Williams might in fact be guilty. If so, the court said, that would have tainted their ability to be fair and impartial to the defendant. When the court asked for a show of hands as to whether that was so, no hands were raised. The court then restated and emphasized that Williams had never pleaded guilty, was presumed innocent, and that the prosecution bore the burden of proving him guilty beyond a reasonable doubt. After that, the court asked for a show of hands by any jurors who could not set aside the court's mistake or who could not safeguard Williams's rights and follow the correct standard of proof. No jurors raised their hands. The court found no prejudice from its error and sent the jury back to deliberate.

The next morning, however, Juror No. 1 sent a letter to the court stating that despite his reluctance to say so the day before, he went through the trial thinking Williams was guilty and "saw everything through that lens." Although it might be possible to ignore that during deliberations, Juror No. 1 was not sure he could. The juror was also unsure whether he had any "subconscious biases" that might play a role in his deliberations, and left it to the court to decide whether he should remain on the jury. When defense counsel moved for a mistrial, the court reserved a ruling until it could question the jurors again. The court dismissed Juror No. 1, then called the remaining jurors and alternates into the courtroom for questioning.

The court told the jury that it had dismissed Juror No. 1 because the juror was unsure about his ability to deliberate fairly due to the court's misstatement about the guilty plea. The court said it would be wrong and unfair for a juror to listen to the

evidence in order to support the mistaken belief that Williams had pleaded guilty. The court asked whether that was clear to the jurors and whether they had any questions about what the court had just said. When no questions were asked by the jury, the court asked whether any of the jurors or alternates had listened to the evidence on the assumption that Williams had pleaded guilty and had looked at the evidence in that light. None indicated they had. The court then restated and reemphasized that Williams had never pleaded guilty and was presumed innocent, and that the prosecution bore the burden of proving him guilty beyond a reasonable doubt. The court also reminded the jury that Williams had a right to remain silent and his failure to testify was of no significance and was not to be considered. The court then individually polled each remaining juror and alternate as to whether they would disregard the court's mistake and give Williams each of the rights just mentioned. Each juror responded he or she could do so. The court then denied the new mistrial motion.

According to Williams, the court's misstatement was error insofar as it undercut his rights to a fair and impartial jury that was correctly instructed on the burden of proof. He contends that despite these steps, the court's error could not be cured because, viewed objectively, it was so prejudicial that it was inherently and substantially likely to have influenced a juror. (See *People v. Ramos* (2004) 34 Cal.4th 494, 519.) We agree that error occurred, but conclude it was cured and was therefore harmless under the circumstances.

The one juror who was biased due to the court's error was removed. Even though the error obviously affected that juror, we do not believe, when the record is viewed as a whole, that the error was inherently and substantially prejudicial on an objective basis. As set forth in detail above, the jurors were initially told that Williams had pleaded not guilty, and were instructed on the presumption of innocence and the prosecution's burden of proof. The court's error occurred when it restated those instructions right before the prosecutor's opening statement. However, the statement that Williams had pleaded guilty was part of the broader instruction concerning his presumed innocence and the

prosecution's burden of proof.² While the misstatement might have appeared puzzling, we do not believe that a reasonable juror would conclude that a trial was underway for a defendant who had pleaded guilty after being told the defendant's guilt had to be proven beyond a reasonable doubt, and would therefore look at the evidence in that light.³

Moreover, the error was fully cured not just by the court's careful and repeated admonitions to the remaining jurors, but by the court's instructions as well. These included telling the jury that: (1) it was the exclusive trier of facts based solely on the evidence received; (2) it was not the court's role to say what the verdict should be and that nothing the court said or did during the trial should be taken as an indication of what the court thought about the case; and (3) the fact that Williams was charged with a crime was not evidence the charge was true and the prosecution had the burden of showing his guilt beyond a reasonable doubt.

Under well-established principles of harmless error concerning trial court instructional misstatements, we hold that the error was cured. (See *People v. Robinson* (2005) 37 Cal.4th 592, 641, fn. 24 [court told jury defendant's race was not to be considered *until* reaching the penalty; when record viewed as whole, the trial court's

² The trial court said: "I will now explain the presumption of innocence and the People's burden of proof. The defendant has pleaded guilty to the charges. The fact that a criminal charge has been filed against the defendant is not evidence that the charge is true. You must not be biased against the defendant just because he has been arrested, charged with a crime, or brought to trial. A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove each element of a crime and special allegations beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt unless I specifically tell you otherwise." The court concluded with the proper instruction defining proof beyond a reasonable doubt and told the jury that "[u]nless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty."

³ Certainly none of the other jurors in this case felt that way. Therefore, we reject Williams's contention that some of the jurors might have speculated whether Williams pleaded guilty during the five-day span between the start of voir dire, when the court correctly said Williams had pleaded not guilty, and the completion of jury selection, when the court misspoke.

“single and obvious misstatement was harmless error.”]; *People v. Box* (2000) 23 Cal.4th 1153, 1212 [when correct written instructions are given, no prejudicial error occurs]; *People v. Long* (1970) 6 Cal.App.3d 741, 750 [court’s misstatement that a prior felony conviction may establish guilt was inadvertent and did not result in a miscarriage of justice].)

2. *Admission of Williams’s Prior Rape Conviction Was Proper*

In 1994, Williams was convicted of raping the 57-year-old grandmother of a woman who had spurned him, apparently as a means of revenge. In a pretrial hearing, the court rejected defense counsel’s effort to exclude from evidence the fact of that conviction. The jury was told that Williams and the prosecution had stipulated to the fact that Williams had a prior rape conviction, but the jury did not hear the facts underlying the offense because the victim was too ill to testify. Williams contends the trial court erred in determining the probative value of that conviction outweighed its prejudicial effect, and in fact failed to make that determination at all. He also contends that the statute allowing evidence of prior sex crime convictions in current sex crime trials (Evid. Code, § 1108 (§ 1108)), is unconstitutional both on its face and as applied here.

Section 1108 provides that at the trial of a defendant charged with a sex offense, evidence that the defendant previously committed another sex offense is admissible, subject to Evidence Code section 352 (section 352). Section 352 provides that the trial court may exclude evidence, if, after weighing its probative value against its prejudicial impact, concludes that its prejudice outweighs its relevance. We review the trial court’s section 352 ruling for an abuse of discretion and will reverse only if the trial court’s ruling was arbitrary, whimsical, or capricious as a matter of law. (*People v. Branch* (2001) 91 Cal.App.4th 274, 281-282.)

Williams contends his prior rape conviction should have been excluded because it involved the revenge rape of a 57-year-old woman and was therefore too dissimilar from the current charges. We disagree. First, section 1108 by its terms allows evidence of any prior sex offenses. Second, the prior and current crimes need not be the same to be

admissible. (*People v. Frazier* (2001) 89 Cal.App.4th 30, 40-42.) For instance, the court in *People v. Cromp* (2007) 153 Cal.App.4th 476, rejected a due process challenge to the admission of a prior conviction for the rape of a developmentally disabled woman at the defendant's trial for child molestation. Although the defendant contended the prior and current offenses were too dissimilar, the Court of Appeal disagreed: "The fact that defendant committed a sexual offense on a particularly vulnerable victim in the past logically tends to prove he did so again with respect to the current offenses." (*Id.* at p. 480.) The same is true here. Williams's prior conviction was for a rape that occurred when someone turned down his sexual advances, and squares with Christyn's account of how Williams proceeded to become angry and digitally penetrated her vagina after she too turned down his sexual advances. We conclude that the trial court reasonably concluded the prior conviction was admissible under sections 352 and 1108.

As for the trial court's supposed failure to actually exercise its discretion under section 352, the record clearly shows that it did so. Both sides submitted competing motions concerning the admissibility of the prior conviction and both motions discussed section 352. When the court heard argument on the motion, it described section 1108 and the rule that prior sex offenses were admissible in sex offense trials, subject to section 352. Under section 352, the trial court said, it had to determine that the information was relevant and was not substantially outweighed by prejudice in order for it to be admissible. Although the court agreed the prior and current offenses were factually distinguishable, it found both sufficiently similar because both involved sex offenses committed after Williams's sexual advances had been rejected. As a result, the trial court said, it found that the probative value of the evidence outweighed any prejudicial effect. In short, there is no doubt that the trial court engaged in the proper weighing process under section 352. (*People v. Branch, supra*, 91 Cal.App.4th at p. 282.)

Williams's contention that section 1108 violates his constitutional due process rights was rejected in *People v. Falsetta* (1999) 21 Cal.4th 903, 917-918. He also contends section 1108 was unconstitutional as applied to him because the prior conviction and current offenses were so dissimilar. As our citation to *People v. Cromp*,

supra, 153 Cal.App.4th at page 480 makes clear, however, the past and present offenses were sufficiently similar to satisfy due process concerns.

3. The Trial Court's Duress Instruction Was Proper

Although Penal Code section 289 applies to sexual penetration with a foreign object by means of duress, it does not define what constitutes duress. (Pen. Code, § 289, subd. (a)(1).) The trial court, without objection, instructed the jury that “[d]uress means a direct or implied threat of force, violence, danger, hardship, or retribution that is enough to cause a reasonable person of ordinary sensitivity to do or submit to something that he or she would not otherwise do or submit to. When deciding whether the act was accomplished by duress, consider all the circumstances, including the age of the other person and her relationship to the defendant.” Williams contends this instruction was wrong because its use of the age factor is a concept that belongs to cases involving child sex victims and allowed the jury to focus on the inflammatory 20-year age difference between him and Christyn. We disagree.

The goal of statutory interpretation is to determine legislative intent. When a statute is unclear or ambiguous, that defect may be resolved by harmonizing it with other statutes that are part of the same law or concern the same or similar subject matter. (*People v. Honig* (1996) 48 Cal.App.4th 289, 327-328.) The rape statute, Penal Code section 261, subdivision (b), defines duress nearly the same as did the trial court here, including the directive to consider the relative ages of both victim and accused. Rape, of course, is a crime that can be, and often is, perpetrated by adults on adult victims. We can think of no good reason, and Williams offers none, why the standard for duress should be harder to satisfy for sexual penetration under Penal Code section 289 than it is for rape. Furthermore, Penal Code section 261.6 provides that when consent is at issue in a variety of sex offenses, including both rape and sexual penetration, consent must be defined to mean “positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved.” Consent is both a corollary to and the flip-side of duress. If

consent is to be defined the same for both rape and sexual penetration, then so should duress. Accordingly, we hold that the trial court's instruction was correct.

4. *Absence of the Instruction to View With Caution
Williams's Admissions Was Harmless Error*

Williams contends and respondent concedes that the trial court erred by failing to instruct the jury to consider with caution any of his oral statements that were not written or recorded. (*People v. Quach* (2004) 116 Cal.App.4th 294, 299.) Because the jury was instructed to carefully review all the evidence, the error was harmless. (*Ibid.*)

5. *There Was No Ineffective Assistance of Counsel*

During her argument, the prosecutor explained to the jury why Williams's prior rape conviction was admissible: "So juries should know that when they are deciding whether someone is guilty of a sexual offense, we should know that they have done this before, that they might have a propensity, that means an inclination a likelihood to do it again. And so in this case you are being told he's done it before and he admits that."

Williams contends this was misconduct because it suggested he had previously committed the crime of forced penetration. His lawyer's failure to object amounted to ineffective assistance of counsel, according to Williams. It seems clear to us that the prosecutor was classifying rape and forced sexual penetration as sexual offenses and was not suggesting that Williams had previously committed the crime of forced penetration. We deem it highly unlikely that any reasonable juror would conclude otherwise. Because no misconduct occurred, Williams's trial lawyer had no duty to object and ineffective assistance of counsel did not occur. (*People v. Felix* (1994) 23 Cal.App.4th 1385, 1394-1395.)

6. *Cumulative Error Claim*

Williams also contends that the cumulative effect of the many claimed errors he has challenged warrants reversal. We have found only two errors, however, and have

concluded they were harmless. We hold that the same is true even when those errors are accumulated. (*People v. Cornwell* (2005) 37 Cal.4th 50, 98.)

DISPOSITION

For the reasons set forth above, the judgment is affirmed.

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RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

BIGELOW, J.